In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-658

CHARLES COLES DIGGS,
ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 516 F.2d 1248. The opinion of the Civil Aeronautics Board amending a foreign air carrier permit (Pet. App. 4a-9a), the Presidential approval of that amendment (Pet. App. 27a), the amended permit (Pet. App. 28a-31a), and the recommended decision of the Administrative Law Judge (Pet. App. 10a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1975. The petition for a writ of certiorari was filed on November 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether Section 1006(a) of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 49 U.S.C. 1486(a), which provides that "any order in respect of any foreign air carrier subject to the approval of the President" shall not be reviewed by a petition for review in the court of appeals, precludes review in the court of appeals in this case.

STATEMENT

The governments of the United States and the Republic of South Africa entered into a bilateral agreement providing that airlines of each country may operate international air service between the two countries. 61 Stat. 3057. The Republic of South Africa designated South African Airways ("SAA"), an air carrier of the Republic of South Africa, to operate such a route. In 1968 SAA was authorized to fly between New York and Johannesburg via Rio de Janeiro pursuant to that bilateral agreement.

SAA submitted an application to the Civil Aeronautics Board in 1972 seeking to amend its permit to enable SAA to operate a shorter route between Johannesburg and New York via the Canary or Cape Verde Islands. Several members of the United States House of Representatives and associations of black United States citizens, the petitioners in this case, intervened before the Board and requested that hearings be held to examine allegations that SAA engages in racial discrimination. The Administrative Law Judge sustained that request in part,[1] and hearings were held with respect to some of SAA's practices, including its policies and practices regarding employment in this country, international flights and operation

[1]Among other matters, the Administrative Law Judge directed that the hearings would embrace SAA's compliance with the Civil Rights Act of 1964 and the anti-discrimination provisions of the Federal Aviation Act (49 U.S.C. 1374).

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of the Johannesburg Airport. However, the Administrative Law Judge concluded that petitioners' allegations that SAA discriminates on domestic "continuation" flights within the Republic of South Africa were beyond the scope of the proceeding, and he declined to allow petitioners to introduce evidence with respect to those allegations.

The Administrative Law Judge found "that SAA does not discriminate racially * * * in any of the services or facilities it employs in foreign air transportation" (Pet. App. 19a) and recommended that the application be granted. The Board considered exceptions to the Administrative Law Judge's recommendations and found that SAA does not discriminate in international flights and facilities (Pet. App. 7a, 8a and n. 6). The Board concluded that discrimination on flights wholly within South Africa should not be considered.[2] The Board said that "however deeply the Board may deplore the racial policies and practices" of SAA (Pet. App. 8a), it would not convert the proceeding into an examination of South African domestic policy. To do so, the Board reasoned, would improperly inject the Board into "complex and delicate diplomatic questions," requiring the agency "to pass judgment on the internal policies of a foreign government" (*ibid.*).

The Board submitted its proposed order to the President for approval pursuant to Section 801 of the Aviation Act,

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[2]The Board's finding with respect to the absence of discrimination on SAA's "facilities and accessorial services" (Pet. App. 7a) refers only to international matters. The phrase was immediately preceded by a finding as to "international flights" and the paragraph itself concluded with a finding as to "the international section" of the Johannesburg airport. Petitioners' assertion that the Board found that SAA does not discriminate on flights within South Africa without entertaining their evidence in that regard (Pet. 6-8, 16-17, 19 n. 8) is inaccurate.

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49 U.S.C. 1461, and the President approved that order (Pet. App. 27a). SAA has operated weekly flights over that route for more than two years.

Petitioners filed a petition in the Court of Appeals for the District of Columbia Circuit seeking review of the amendments to SAA's certificate. That court dismissed the petition without reaching the merits, relying on Section 1006(a) of the Aviation Act, 49 U.S.C. 1486(a), which precludes judicial review of "any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act * * *." The court of appeals wrote (Pet. App. 3a): "We hold that the clear and unambiguous language in Sections 1006(a), 101(19), and 101(21) (c) of the Act deprives us of jurisdiction to review the challenged order."

ARGUMENT

Section 1006(a) expressly precludes review in the court of appeals of any order with respect to a foreign air carrier that is subject to approval by the President. It is undisputed that SAA is a foreign air carrier and that the order in question required and received Presidential approval.

This case does not present an occasion to resolve the apparently conflicting views in the courts of appeals concerning the prohibition of judicial review announced in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103. *Waterman* involved an application by a United States carrier to engage in international air transportation. Such orders also require Presidential approval, but Section 1006(a), which is addressed only to foreign air carriers, does not affect judicial review of those orders. On the basis of considerations bearing on the Executive Branch's prerogatives in foreign affairs, this Court concluded in *Waterman* that orders with respect to domestic carriers are not reviewable.

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The court of appeals' decisions cited by petitioners (Pet. 11-14) create exceptions to the *Waterman* rule and allow review of certain types of orders involving domestic carriers. Those decisions do not suggest that a court could create an exception to the express statutory prohibition of judicial review of foreign carrier orders. On the contrary, courts without exception have held that the courts of appeals lack jurisdiction to review foreign carrier orders. *British Overseas Airways Corp.* v. *Civil Aeronautics Board*, 304 F.2d 952, 952-953 (C.A.D.C.); *Dan-Air Services, Ltd.* v. *Civil Aeronautics Board*, 475 F.2d 408, 411-412 (C.A.D.C.). As the court explained in *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 392 F.2d 483 (C.A.D.C.), judicially created glosses upon the judicially created *Waterman* rule are irrelevant to the meaning of the rule created by Congress in Section 1006(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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